SUPREME COURT, U.S.
OCT 22 1974

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-468

CARLISLE WILSON WEBSTER - - Petitioner

versus

COMMONWEALTH OF KENTUCKY Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Supreme Court Of The United States

OCTOBER TERM, 1974
NO. _____

CARLISLE WILSON WEBSTER *Petitioner*

versus

COMMONWEALTH OF KENTUCKY *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Carlisle Wilson Webster, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner by the Wolfe Circuit Court at Campton, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was reported and is cited as *Webster* v. *Commonwealth*, Ky., 508 S.W.2d 33 (1974). It is also printed in the Appendix to this petition at pages 1a-7a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motion for rehearing appears in the Appendix at page 8a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on February 1, 1974. A timely petition for rehearing was denied on May 10, 1974. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Petitioner realizes that he has filed a belated petition for certiorari in this a criminal case arising out of a state court. He further understands that a request for a consideration of an untimely petition is not a jurisdictional question, but rather a question of discretion. However, Petitioner respectfully urges this Court that, even though the petition has been filed out of time, a consideration of the petition is justified in the discretion of the Court as prescribed by the Rules of the Court, for the following reasons:

Petitioner, as stated above, filed a timely petition for rehearing with the Court of Appeals of Kentucky. The petition was subsequently denied on May 10, 1974. However, neither of Petitioner's counsels, William P. Bach nor Frank E. Haddad, Jr., received any notice or copy of the mandate from the Clerk of the Court of Appeals as required by Rule 1.340(c)[1] of the Rules of the Court of Appeals of Kentucky [See Affidavits of William P. Bach and Frank E. Haddad, Jr., Appendix 30a-32a]. It was not until August 19, 1974, that Frank E. Haddad, Jr. discovered, when he called the Clerk's office to inquire as to the status of the case, that the petition for rehearing had been over-ruled and the mandate had

[1]RCA 1.340(c). Upon issuance of the mandate the Clerk shall forthwith send it to the trial court from which the appeal was taken and a copy thereof to each attorney of record. The clerk of the trial court shall forthwith file the mandate in the original record and note the filing on the proper docket.

issued on May 10, 1974. At that time, more than ninety (90) days had expired within which the Petitioner had to file a petition for certiorari in this Court as provided for in Rule 1.445(b)[2] of the Rules of the Court of Appeals of Kentucky, the ninety (90) day time limitation having expired on August 8, 1974. Petitioner then, in an effort to obtain a new time period in which to file a timely petition for certiorari, moved the Court of Appeals to recall the mandate and to issue same anew (Appendix 28a-29a), and attached the affidavits of counsel, referred to above, to that motion. The Court of Appeals denied, without prejudice to file a belated petition for certiorari, Petitioner's Motion to Set Aside Issuance of Mandate and to Reissue Same Anew (Appendix 33a).

Therefore, as the reason for filing a belated petition for certiorari is not a lack of diligence on the part of Petitioner nor his counsel in processing the petition, but an unfortunate happening due to lack of notice as described above, Petitioner respectfully believes that a consideration by this Court of the belated petition for certiorari herein would be a proper exercise of discretion by the Court and would, moreover, serve to promote fairness for a criminal defendant.

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[2]RCA 1.445(b). When a party desires to make application for a writ of certiorari, a stay may be granted by any Judge of this Court for such specified number of days, not exceeding 90, as may reasonably be required to enable the writ to be obtained, and may be conditioned upon the giving of adequate security as specified in Title 28, Section 2101(f), U.S. Code.

QUESTIONS PRESENTED

I. A. Whether Petitioner was Denied His Sixth Amendment Right of Confrontation When the Trial Court Admitted Testimony as to an Oral Confession Made by a Co-Defendant Out of the Presence of and Inculpating the Petitioner, Without an Accompanying Instruction Limiting the Jury's Consideration of the Admission to the Co-Defendant alone?

B. Whether the Denial of Petitioner's Right of Confrontation was an Error Affecting a Substantial Constitutional Right Such That This Court, in Furtherance of the Fair Administration of Criminal Justice, Should Consider the Question as Presented Even Though Defense Counsel did not Object Until a Motion for New Trial?

II. Whether the Petitioner was Denied His Sixth Amendment Right of Confrontation and Fourteenth Amendment Due Process Right to a Fair Trial When the Prosecutor, in his Closing Argument, Referred to Him as a Professional Burglar?

CONSTITUTIONAL PROVISIONS

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 17, 1971, Petitioner, Carlisle Wilson Webster, co-defendant Mildred Spencer and another man named Cox were seen parked in the Parkway Standard Station located in Wolfe County, Kentucky, on top of a hill before the entrance to the Mountain Parkway. As close as can be determined from the testimony of Deputy Sheriffs Brewer and Center, the time of day was late afternoon. Deputy Center testified that he saw the car in which Petitioner was riding come into the station, and that he observed Webster and Cox in the vicinity of the Coca-Cola machine that was later discovered to have been burglarized. He also testified that he was unable to see at that time whether the door of the vending machine was open or closed. He stated that the

Petitioner and two other persons then left the station, but that he did not see them leave with anything and that Webster did not appear to be intoxicated while at the station (T.E. 61-64).

When Webster and the two persons accompanying him left Parkway Standard, Deputies Brewer and Center followed them to the Frosty Freeze, a dairy bar. Deputy Brewer testified that one of the occupants of the car broke a pop bottle and that he and Center pulled up along side of them. Mr. Cox was said to be the driver of the automobile. Deputy Brewer stated that he arrested Cox for driving without an operator's license and Deputy Jones arrested the Petitioner and charged him with public drunkenness (T.E. 16-17). Deputy Center testified that Webster's arrest took place about five minutes after leaving Parkway Standard Station (T.E. 63). Mrs. Spencer was not placed under arrest at that time (T.E. 35).

Following the arrests of Cox and Petitioner, Deputy Jones, according to Deputy Brewer, removed some items from the car (T.E. 17). However, no search warrant had been issued or applied for. Brewer testified that he observed a coin box and two closed shaving kits on the floor of the automobile (T.E. 48). Webster was also searched at the time of his arrest. A pronged tool, a screwdriver and a pocket knife were removed from his person (T.E. 36). After being transported to the county jail, he was searched again and another tool, similar to the one taken from him at the time of arrest, was taken from him along with some allen wrenches (T.E. 25-27). Petitioner was advised of his constitutional rights for the first time after being taken to jail.

Cox was released following the payment of a fine for operating a vehicle without a driver's license (T.E. 120) and Webster was locked up by Sheriff Nickell so that he might sober up (T.E. 100). Before leaving the Court House, Cox went to the restroom. A few minutes after he exited, Sheriff Nickell entered the restroom and found a jar containing four nickels, seven dimes, five quarters and two pennies. At that time it was not known that the Coca-Cola machine at Parkway Standard Station had been broken into and the coin box therein removed.

At approximately ten or eleven o'clock on the night of Petitioner's arrest for public drunkenness, State Trooper Howard travelled to the Wolfe County Jail in Campton. After viewing the tools taken from Webster, he drove to the Parkway Standard to see if any of the vending machines located there had been burglarized. A check of the machines was made and loose change was observed to fall through the Coca-Cola machine and onto the ground. However, Howard testified that he did not know for sure that the vending machine had been broken into until the next morning, July 18, 1971 at about one or two o'clock when Lloyd Campbell, the owner of the station, arrived with the key and unlocked it (Appendix 22a). Sheriff Nickell carried the tools recovered from the Petitioner to Parkway Standard and attempted to open several vending machines. As he testified, he was able to open a candy machine, *but could not open the Coca-Cola machine in question* (T.E. 134-135).

At a few minutes after midnight on Sunday morning, July 18, 1971, Mildred Spencer, who up to this time had not been arrested, was stopped at an intersection near

Campton and arrested for possession of burglary tools. The car which she was driving, being the same car in which Webster was riding at the time of his arrest, was impounded. A search warrant was obtained and the car was searched at the jail. Another tool with prongs, similar to the ones already seized, was found on the dash of the car (Appendix 14a).

Mrs. Spencer was advised of her constitutional rights. After this advisement she made an admission to Sheriff Nickell, without an attorney present, that the Petitioner and Cox had opened the Coca-Cola machine and she had been the "look-out." She further related to the Sheriff that she was cooperating because she wanted to go and did not want her name used (Appendix 9a).

In July, 1971 the Wolfe County Grand Jury returned two indictments against Webster, charging him with breaking and entering a vending machine at the Parkway Standard Station and with having in his possession burglary tools. The Petitioner entered pleas of not guilty to the charges in both indictments. All of the charges against him were consolidated for trial on the motion of the Commonwealth's Attorney, and he was tried jointly with Mildred Spencer. Two trials were had and the jury in the first trial failed to reach a verdict after being sent back to deliberate on three separate occasions by the trial judge. The judge, feeling doubtful that he should try the case at the second trial, vacated the bench and a special judge was appointed to try the case. The second trial began on April 17th, 1972, and lasted for two days.

The first federal question posed by the Petitioner pertains to the trial judge admitting an out-of-court con-

fession by co-defendant Spencer without giving an instruction to the jury limiting its use to Spencer alone. Defense counsel was given a prior continuing objection to the instructions to the jury as the trial judge refused to allow him to see them before they were read to the jury (T.E. 176). The court did not give a limiting instruction on the co-defendant's confession and counsel then included the error as one of his grounds in the motion for new trial (T.R. 19).

The second question of constitutional dimension posed by the Petitioner relates to the closing argument by the Commonwealth's attorney. The prosecutor repeatedly referred to Webster as a "professional burglar", a fact which was not supported by the evidence to be considered by the jury. Defense counsel objected numerous times to the improper argument, but the trial court overruled each and every objection (Appendix 24a-25a).

On appeal, Petitioner raised both of the above issues and urged in his original brief that he had been denied his Sixth Amendment right of confrontation in both instances. The Kentucky Court of Appeals affirmed the conviction of the trial court and denied a timely filed petition for rehearing (Appendix 8a). The Court of Appeals took the position that defense counsel, William Bach, had failed to properly preserve the question of admission of the co-defendant's confession against Webster. And, the Court concluded that the prosecutor's description of Petitioner as a "professional" was a proper inference to be drawn from the evidence.

The jury returned a verdict finding Webster guilty on both charges and fixed his punishment at three years for

breaking and entering and ten years for possession of burglary tools. A motion for new trial was filed, detailing the grounds upon which the court should have set aside the verdict. After a hearing and arguments, the court denied the motion and on December 4, 1972, sentenced the Petitioner to serve a period of three years on the first indictment and ten years on the second indictment, the sentences to be served consecutively in the State Reformatory. The state appeal followed.

The case was tried at both trials by William P. Bach, Jackson, Kentucky, Attorney for Petitioner, and by A. Dale Bryant, Jackson, Kentucky, Attorney for the Commonwealth of Kentucky.

REASONS FOR GRANTING THE WRIT

I. THE ADMISSION OF TESTIMONY AS TO AN ORAL CONFESSION MADE BY A CO-DEFENDANT OUT OF THE PRESENCE OF AND INCULPATING THE PETITIONER, WITHOUT AN ACCOMPANYING CAUTIONARY INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF THE ADMISSION TO THE CO-DEFENDANT ALONE, WAS A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

As the Denial of Petitioner's Right of Confrontation Was an Error Affecting a Substantial Constitutional Right, A Question as to the Fair Administration of Criminal Justice Is Presented Even Though Defense Counsel Did Not Tender An Objection Until a Motion for New Trial.

A. At the trial of this case, Sheriff Maynard Nickell testified that co-defendant Mildred Spencer made an

oral confession to him, *out of the presence of Petitioner*, that "when they pulled into the machine up there Webster and Cox fixed the machine, she didn't know what all they did, but they opened it and she stood lookout for them" (Appendix 9a). We respectfully submit that Petitioner's Sixth Amendment right of confrontation was violated in this case for three reasons as a result of the above testimony: (1) The out-of-court oral confession of the co-defendant inculpating the Petitioner was admitted at trial; (2) The co-defendant did not take the stand; (3) The trial court did not instruct the jury that the confession by co-defendant Spencer should not be considered against the Petitioner.

The Petitioner sincerely believes that a case recently decided by this Court, *Bruton* v. *United States*, 391 U.S. 123 (1968), is controlling here. In that case Bruton was tried jointly with a co-defendant, Evans, and both defendants were convicted. A postal inspector testified that Evans had orally confessed to him that he and Bruton had committed the criminal act of armed robbery. This Court reversed Bruton's conviction, holding:

> " . . . admission of Evan's confession in the joint trial violated Petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

The Court then went even further, and stated:

> " . . . Evans' confession added substantially, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner was denied his constitutional right of confrontation."

In three recent cases the Kentucky Court of Appeals was obliged to consider the issue of a co-defendant's out-of-court admission or confession incriminating a defendant. *Taylor* v. *Commonwealth*, Ky., 461 S.W.2d 920 (1970); *Meyer* v. *Commonwealth*, Ky., 472 S.W.2d 479 (1971); *Bunton* v. *Commonwealth*, Ky., 464 S.W.2d 810 (1971). Although the Court affirmed the convictions in all of those instances, the situations in those cases were completely different from that in *Bruton*, and in the present case. In those cases both defendants had confessed and their confessions were nearly identical in content. And, in *Meyer*, the trial court admonished the jury not to consider the co-defendant's confession against the defendant. However, in the instant case Petitioner did not make any confession or admission; only Mrs. Spencer made an admission. In addition, the jury was not admonished. While the above cases affirmed the judgments of the lower courts, the Court of Appeals indicated that *Bruton*[3] would be followed where the facts such as here were nearly identical.

Petitioner has argued that his right of confrontation was violated. But, in connection with this argument, it should be pointed out that the admission of Mrs. Spencer added substantially to the weight of the Commonwealth's case against him. The other evidence against Webster was entirely circumstantial. No witness

[3]See *United States* v. *Lyon*, 397 F.2d 505 (CA 7 1968) and *United States* v. *Guajardo-Melendez*, 401 F.2d 35 (CA 7 1968), in which convictions were reversed, relying upon *Bruton* v. *United States*, supra, where a co-defendant's confession or admission was admitted into evidence by testimony of police officers. See also *United States* v. *Atwell*, 398 F.2d 505 (CA 5 1968); *Evans* v. *Dutton*, 400 F.2d 826 (CA 5 1968); *Serio* v. *United States*, 401 F.2d 989 (CA D.C. 1968); *Loftis* v. *State*, 433 S.W.2d 704 (1968); *Schepps* v. *State*, 432 S.W.2d 926 (1968).

saw Petitioner break into the Coca-Cola machine. Thus, with only circumstantial evidence from which to determine his guilt beyond a reasonable doubt, the jurors may have very well weighed Spencer's admission heavily as against Webster. In *Chapman* v. *California*, 366 U.S. 18 (1967), this Court held:

> "Before a Federal Constitutional error be made to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

It is very doubtful that the error here was harmless beyond a reasonable doubt. Although the United States Court of Appeals, Sixth Circuit, in *United States* v. *Clayton*, 418 F.2d 1274 (CA 6 1969), affirmed the conviction of the defendant in that case saying that the admission of a statement by the co-defendant if error was harmless beyond a reasonable doubt, the lower court had instructed the jury that they should not consider the admission against the defendant. In addition, there were three eyewitnesses to the crime. In the present case, again, there was no cautionary or limiting instruction given and the evidence was purely circumstantial.

After reviewing the case authority on the admission of out-of-court confessions by a co-defendant inculpating another defendant, it is obvious that at the very least a trial court is required to give an instruction limiting the jury's consideration of such an admission to the co-defendant alone. However, the Kentucky Court of Appeals in this case did not reach the issue of right of confrontation because it felt that defense counsel, William Bach, had failed to properly raise the question so as to save it for appeal. In fact, the Court indicated

that the use of Mildred Spencer's admission against the Petitioner would have constituted reversible error if the question had been properly raised (Appendix 5a):

> *"We are of the opinion that Webster may very well have prevented the use of Mildred's admission as against himself had he moved for a separate trial or objected to the Sheriff's testimony, and that unquestionably he would have been entitled to an admonition had he asked for it.* As it is, however, the subject was never brought to the attention of the trial Court until mentioned among numerous other points in a motion for a new trial." (Emphasis added)

It is true that Mr. Bach did not object to Sheriff Nickell's testimony concerning Mildred Spencer's admission until he raised the error in his Motion for New Trial in objecting to the court's instructions to the jury, ground 14 (T.R. 19), stating:

> "The Defendants' objection to the failure of the Court to properly instruct the jury on the weight of evidence to be considered against the Defendant Webster as regards the said confession and admission of the Defendant Spencer should have been sustained and remedied."

The above specific objection was made in the motion for new trial pursuant to Kentucky Rules of Criminal Procedure 9.54(2)[4] and not prior to the giving of the instructions due to the fact that the trial judge did not allow defense counsel the opportunity to see the instructions beforehand.

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[4]RCr. 9.54 Instructions. (2) It shall not be necessary in order to preserve error that objections to instructions be made during the trial, but unless so made they must be presented in a motion for new trial. No objection shall be sufficient unless the specific grounds are stated.

The Petitioner realizes that ordinarily where there is no objection to evidence during a trial, an attempted objection in motion and grounds for new trial does not save the error. *Arnold* v. *Commonwealth*, Ky., 433 S.W.2d 355 (1968); *Franklin* v. *Commonwealth*, Ky., 477 S.W.2d 788 (1972). Those cases make distinctions between objections to instructions and objections to evidence. However, the cases may be distinguished from the case at bar upon one very important fact. The co-defendants in both of those cases each had different attorneys. In fact, the Court of Appeals in *Franklin* made a special effort to point out that fact. In the instant case, the co-defendants had the same counsel. An objection to Mrs. Spencer's admission would have been an action towards discrediting her. This an attorney should not do as he is under the duty to provide a client with the best possible effort at representation. And indeed, Mr. Bach would also have found it difficult to request to cross-examine his own client, Spencer, in an attempt to discredit her in favor of his other client, Webster.

However, so incriminating to the Petitioner was the admission of Spencer as testified to by Sheriff Nickell, the court should have submitted a cautionary instruction to the jury limiting their consideration of the admission to Spencer alone. It is understandable why the trial court did not admonish the jury immediately following the introduction of the admission into evidence because the court had no way of knowing whether either of the co-defendants would take the stand to testify. However, the trial judge was actually aware that neither of the defendants would testify at the time his final instructions were given to the jury.

Therefore, he should have instructed the jury that the admission of Mrs. Spencer was not to be regarded as evidence against Webster. Because of the unique circumstances outlined above, specifically the fact that both the defendants were represented by the same attorney, the Petitioner feels that the trial court's error in not properly instructing the jury was saved for appeal.

B. Although the Court of Appeals of Kentucky concluded that the issue of right of confrontation was waived by Petitioner, we respectfully contend that the right of confrontation is such a substantial right that the Court of Appeals should have reached the substance of the issue. Since that Court did not feel obliged to do so, we now ask this Court to consider the denial of the Petitioner's Sixth Amendment right in light of the fair administration of criminal justice.

In speaking to the point of when the Kentucky Court of Appeals will consider the violation of the defendant's rights where defense counsel fails to make a proper objection, the Court in *Futrell* v. *Commonwealth*, Ky., 437 S.W.2d 487, 488 (1969), stated:

> "Violation of constitutional rights, the same as of other rights, may be waived by failure to make timely and appropriate objection. Shockley v. Commonwealth, Ky., 415 S.W.2d 866; Lundberg v. Buckhoe, 6 Cir., 389 F.2d 154. *Of course in an aggravated case involving violations of such proportions as in effect to deprive the defendant of due process the appellate court may grant relief notwithstanding failure to make proper objection . . .*" (Emphasis added)

And, the Court in *Stone* v. *Commonwealth*, Ky., 456 S.W.2d 43, 44 (1970), stated:

". . . RCr. 9.26 states that 'A conviction shall be set aside on motion in the trial court, or the judgment reversed on appeal, for any error or defect when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced.' RCr. 13.04 makes the civil rules applicable under certain circumstances. CR 61.02 states that 'A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by the Court of Appeals on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.' "

The Court of Appeals in *Futrell* affirmed the conviction of the defendant of indulging in indecent or immoral practices with a nine year old girl. The Court held that where no objection had been made at trial to the admission of evidence concerning lineup identification and defendant's admission of guilt following the identification, the errors were not so substantial as to require their consideration because there was other evidence as to the identity of Futrell and the defendant did not deny he was the person that committed the offense. In *Stone*, the Court, on the other hand, decided to review an error not objected to by defense counsel because the trial record showed an important discrepancy in the evidence which had not been detected at trial. The testimony of a witness for the prosecution was the only evidence that the defendant had possession of a stolen check, and the testimony of this witness as to the time the defendant cashed the check was absolutely refuted by information found stamped on the back of the check. Thus, the

above cases present two extremes on the question of when an error not properly objected to at trial will be considered for appeal. In *Futrell,* the Court would not consider the error because other independent evidence existed at trial to sustain the evidence complained of on review. And, the Court considered the error in *Stone* due to the fact that evidence lending itself to greater credibility completely refuted testimonial evidence which is inherently less credible.

The question then becomes, what erors in fact situations falling between the two above extremes will qualify for consideration by a court where no proper objection to them was made in the trial below. We have found a number of federal cases following the guidelines laid down by the Supreme Court in *United States* v. *Atkinson,* 297 U.S. 157 (1936), which will aid in such a determination:

> "In exceptional circumstances, especially in criminal cases, appellate courts in the public interest, may, of their own motion, notice errors to which no exception has been taken, if, the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings . . ."

In *Mims* v. *United States,* 375 F.2d 135 (CA 5 1967), the Court of Appeals held that an instruction to the jury, in a prosecution for attempt to enter a bank with the intent to rob, that as a matter of law the evidence showed such an attempt was plain error and required reversal even though defense counsel had not objected to the instruction. And, in *Alexander* v. *United States,* 390 F.2d 101 (CA 5 1968), the Fifth Circuit, in a case decided a year

after *Mims*, evidenced its feeling that errors of a constitutional dimension would be considered closely on appeal even though not objected to by a defendant. In that case, the Court held, on an appeal challenging the admission of evidence seized by postal inspectors, that the question of what are predicates of a postal inspector's arresting authority, though not presented by the defendant, was a basic constitutional question reviewable under the plain error rule.

Finally, in *Cleaver* v. *United States*, 238 F.2d 766 (CA 10 1956), a case very similar to the case at bar, the Court of Appeals took notice of the question of whether statements by a co-defendant tending to connect the defendant with a conspiracy to burglarize a United States Post Office were competent as to him, even though no instruction limiting the evidence as to the defendant was requested, and where no other evidence showed that he was a part of the conspiracy:

> " . . . Where evidence is admissible as to one of several defendants it generally must be received and then it becomes the duty of the others to submit instructions limiting its effect. Dauer v. United States, 10 Cir., 189 F.2d 343. In the instant case no such instruction was given nor was it requested and it has been held that it is incumbent upon the parties to request such instruction and a failure so to do precludes review of the question. Troutman v. United States, 10 Cir., 100 F.2d 628. However, where a serious prejudicial error in the conduct of a trial affects life or liberty a federal appellate court may notice and correct the error even though it was not called to the attention of the trial court. Bogileno v. United States, 10 Cir., 38 F.2d 584; Addis v. United States, 10 Cir., 62 F.2d 329; Kelly v.

> United States, 10 Cir., 76 F.2d 847. For this reason, we examine the evidence given by the witness in relating the statements of defendant Moya."

In the instant case, as in *Cleaver*, the testimony of Sheriff Nickell as to co-defendant Spencer's admissions was admissible as to the co-defendant, but not competent as to the Petitioner. Although there was other evidence tending to connect Webster with breaking and entering the Coca-Cola machine, this evidence was circumstantial. No one at trial testified they actually saw the Petitioner break into the vending machine. In fact, Deputy Center testified that he did not see the Petitioner or his companions leave the Parkway Standard Station with anything. Therefore, we submit that since the admission by Spencer inculpating the Petitioner was not sustained by other independent evidence of a similar nature, such as an eyewitness, the issue of the use of Spencer's admission is reviewable by this Court as a similar question was reviewable by the Court in *Cleaver*.

As already stated, the Petitioner relies on *Bruton* v. *United States*, supra, as controlling in this case. The case is authority for the contention that Petitioner's right of confrontation was violated because the trial court did not instruct the jury that the admission of Spencer inculpating Webster should not be considered against him. However, we also feel that *Bruton* is authority for the contention that the denial of Petitioner's right of confrontation was an error affecting a substantial constitutional right of Webster. This is illustrated by the fact that this Court held that the introduction of co-defendant Evans' confession could not

be cured by an instruction to the jury limiting the use of that evidence. In *Bruton*, the constitutional error was substantial because there was a reasonable doubt as to whether Evans' confession added critical weight to the Government's case as it was not built on overwhelming evidence. As in *Bruton*, the admission of Mildred Spencer's confession was substantial constitutional error, particularly when no limiting instruction was given.

We therefore respectfully ask this Court to grant the Writ of Certiorari so as to be afforded the opportunity both to correct the injustice done to Petitioner below and reaffirm the declared principles of *Bruton* in support of the fair administration of criminal justice.

II. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF PROSECUTORIAL ARGUMENT IN THE FACE OF A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

The Sixth Amendment to the Constitution of the United States guarantees a defendant the right to be confronted with the witnesses against him, whether he is being tried in a state or federal court. *Pointer* v. *Texas*, 380 U.S. 400 (1965). Where the defendant is not given the opportunity to cross-examine, his guaranteed right is violated. 5 Wigmore, *Evidence*, Section 1364 (3d ed. 1940). The Petitioner's Sixth Amendment right was violated in this case when, in his closing argument to the jury, the Commonwealth's Attorney repeatedly referred to him as a professional burglar (Appendix 24a-25a):

"Mr. Back's argument centered around the Sheriff and the State Police force. They didn't do the job a highly trained police force in a larger city dealing with professionals would do. We don't have any professionals around here. We have boys going out and breaking store windows and going into a store and getting a few items but every once in a while a professional rogue will go through out county and—
MR. BACK: Object. There is no evidence these people are professionals.
COURT: Overuled.
MR. BRYANT (continuing): From this evidence you are bound to conclude they are professional burglars. Mr. Back concluded they are innocent. There is ample evidence for you to conclude they are professionals. A man making a living stealing what other people work out. He is smart too. He's smart.
MR. BACK: Object.
COURT: Overruled.
MR. BRYANT (Continuing): He is real smart. He was smart enough to make these tools.
MR. BACK: Object.

The Commonwealth's Attorney, in referring to Petitioner as a professional, essentially stated a new fact to the jury. These statements neither referred to a fact in evidence nor supported by the evidence. A long line of cases in Kentucky establishes the rule that counsel must confine himself to the facts in the record during argument and that deliberate excursions beyond the record which are calculated to influence or prejudice the jury constitute reversible error. *Louisville & N.R. Co.* v. *Hull*, 113 Ky. 561, 68 S.W. 433 (1902); *Hurst* v. *Williams*, Ky., 102 S.W. 1176 (1907); *Gunterman* v.

Cleaver, 204 Ky. 113, 263 S.W. 683 (1924); *Caudill* v. *Commonwealth*, 239 Ky. 712, 40 S.W. 2d 334 (1931); *East* v. *Commonwealth*, 249 Ky. 46, 60 S.W. 2d 137 (1933); *Strong* v. *Abner*, 268 Ky. 502, 105 S.W. 2d 599 (1937); *Sexton* v. *Commonwealth*, 304 Ky. 172, 200 S.W. 2d 290 (1947); *Jones* v. *Commonwealth*, Ky., 281 S.W. 2d 920 (1955); *Triplett* v. *Napier*, Ky., 286 S.W. 2d 87 (1955).

A case decided recently by the Kentucky Court of Appeals, and relied upon by Petitioner in his original brief below as persuasive authority, is *Lynch* v. *Commonwealth*, Ky., 472 S.W. 2d 263 (1971)[5]. In that case, as in the instant case, the prosecutor referred to the defendant as a professional in his closing argument. The Court reversed the defendant's conviction, stating:

> "Reference to Lynch in the Commonwealth's closing argument as a 'professional,' though possibly warranted by other information within the knowledge of the prosecuting authorities, was not supported by the evidence under consideration by the jury and was therefore improper. Whatever may be its infirmities, real or fancied, our system of justice seeks to convict solely on the basis of what the defendant has done, regardless of what he is."

However, the Court of Appeals dismissed Petitioner's argument that *Lynch* was authority for his contention that the references to him as a "professional burglar" were prejudicial and deprived him of his constitutional right of confrontation. The Court attempted to justify its conclusion by saying that this case may be distinguished from *Lynch* in that here " . . . it was a fair

[5]Original Brief for the Appellant, at pp. 14-15.

inference for the prosecutor to argue and for the jury to draw from the evidence" (Appendix 5a). The opinion by the Court was based primarily on the facts that "various tools were seized from the defendant and that the coin box had been removed from the machine in broad daylight" (Appendix 5a). But, such a conclusion seems unfounded. It is not logical to label an individual as a professional simply because he is found to possess certain tools. And certainly, there was no testimony provided which could establish that the machine was burglarized in broad daylight. State Trooper Howard testified at trial that it was not known for sure whether the Coca-Cola machine had been broken into until sometime either in the late evening of the day on which the Petitioner was seen at the Parkway Standard Station or early the following morning when the owner unlocked the machine (Appendix 22a).

The prosecutor attempted at trial to support his theory that the Petitioner was a professional burglar by asking the trial court to allow the Commonwealth to introduce into evidence certain items taken by Trooper Howard from the automobile in which Webster had been riding when arrested. The items were such things as an address book containing names of bonding companies and judges and sheriffs from various sections of the United States, an Indiana road map, a racing form, decals, a money bag, jumper cables, a piece of wire and door jammers. However, the trial court refused to permit their introduction into evidence because they were not directly connected with the case at bar and might have reflected the commission of other separate and distinct offenses (Appendix 18a). Therefore, any evidence

supporting an inference that Webster was a professional burglar was only within the personal knowledge of the Commonwealth's Attorney and not in the evidence to be considered by the jury.

The statements of the prosecutor objected to were both unsworn and not subject to cross-examination by the Petitioner. In *United States* v. *Spangelet*, 258 F.2d 338 (CA 2 1958), the United States Court of Appeals found that a statement by an Assistant United States Attorney in his closing argument that he had never made a deal with anyone was reversible error. The Court supported its position in that case by stating:

> "We think the prosecutor's conduct here was equally improper: in effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination."

Not only was the Commonwealth's Attorney in the instant case insulated from cross-examination as to statements in his closing argument, but he was not subject to rebuttal by defense counsel. The Kentucky Rules of Criminal Procedure provide that in the argument to the jury the attorney for the Commonwealth shall have the conclusion and the defendant or his counsel the opening.[6] The United States Court of Appeals, Ninth Circuit, in *Taliaferro* v. *United States*, 47 F.2d 699 (CA 9 1931), found reversible error to exist where the prosecutor referred to a fact not in evidence, reasoning that the defendant was denied the right through counsel to a rebuttal as well as to actual cross-examination of the prosecuting attorney:

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[6]RCr. 9.42 (6).

> "Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal."

It is conceded that while many authorities condemn and hold prosecutorial references to matters outside the record improper in closing arguments, few have dealt with the question of whether such references violate a defendant's right of confrontation. However, Kentucky is one of the rare states which has faced the question directly. In *Turpin* v. *Commonwealth*, 140 Ky. 294, 130 S.W. 1086 (1910), the Court of Appeals reversed a conviction of voluntary manslaughter where the prosecutor stated in his summation that one of the jurors had been "fixed." Neither this fact nor any proof of it had been introduced into evidence. In speaking of the right of confrontation, the Court stated:

> "We cannot pass over so grave an offense against the plainest, as well as most valuable right of a man charged with crime, a right equally valuable to the public which is the guaranty of a fair trial, upon legal evidence only, and face to face with the witnesses who constitute his accusers."

The Court went on to imply that the error might have been cured if the trial court had admonished the prosecutor or directed the withdrawal of the statement. In the case at bar, just as in *Turpin*, the lower court

failed to sustain the objections by defense counsel. Thus, there is no need here to be concerned with any argument as to the effect of a court's attempt to cure.

In spite of the conclusion of the Court of Appeals of Kentucky the case law in this state holds that the type of prosecutorial misconduct in this case constitutes reversible error and is in violation of the Petitioner's right of confrontation and right to a fair trial as guaranteed by the Due Process clause of the Fourteenth Amendment. Thus, a clear problem of error having constitutional dimensions is presented.

This Court has held that a fair trial in a fair tribunal is a basic requirement of Due Process. *In re Murchison*, 349 U.S. 133 (1955). However, prosecutorial misconduct such as occurred in this case presents a significant and widely recognized danger to the fair administration of criminal justice. In far too many cases the prosecutor plays the role of a trial advocate interested first and foremost in securing a conviction. Thus we experience a reluctance on the side of the government to allow the evidence to stand alone without the injection of extraneous prejudicial matters. The conduct of the Commonwealth's Attorney here and of prosecutors in far too many other cases, is in conflict with the prosecutor's role as outlined by this Court in *Berger* v. *United States*, 295 U.S. 78 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

> shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Prosecutorial statements in the form of improper inferences such as we find in this case also present an additional danger to the fair administration of criminal justice due to the obvious advantage already enjoyed by the prosecutor deriving from his position as a representative of the government. The Court of Appeals for the Fifth Circuit recognized such an advantage in *Latham* v. *United States*, 226 F. 420 (1915), when it wrote:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

Therefore, the Petitioner respectfully submits that this Court should grant the Petition in order to reverse

the conviction below and reaffirm the principle that prosecutorial misconduct will not be tolerated where a criminal defendant's Sixth Amendment Right of Confrontation is violated and his right to a fair trial under Due Process of Law is otherwise denied to him.

CONCLUSION

Petitioner was denied his Sixth Amendment right of confrontation and Fourteenth Amendment due process right to a fair trial in the trial of this case below. Because questions have been raised herein concerning substantial constitutional questions and the fair administration of criminal justice, and for the foregoing reasons, we respectfully ask this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

Of Counsel:
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Jackson, Kentucky 41339

APPENDIX

Rendered: February 1, 1974

COURT OF APPEALS OF KENTUCKY
73-266

CARLISLE WILSON WEBSTER APPELLANT

v.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM WOLFE CIRCUIT COURT
HON. S. H. RICE, SPECIAL JUDGE
INDICTMENT NOS. 332 & 337

OPINION OF THE COURT BY JUSTICE PALMORE

AFFIRMING

Carlisle Wilson Webster appeals from a judgment sentencing him to consecutive terms in the penitentiary of three years for breaking a vending machine with intent to steal, KRS 433.190, and 10 years for illegal possession of burglarious tools, KRS 433.120(2), pursuant to a jury verdict on pleas of not guilty. He was tried jointly with one Mildred Spencer, who also was convicted on similar charges.

In the late afternoon or early evening of Saturday, July 17, 1971, Webster and Mildred were in an automobile being driven by a man named Cox. As the car left a service station in or near Campton it was followed by an automobile occupied by three local deputy sheriffs, at least one of whom, while at the service station, had noticed Cox, Webster and Mildred[1] standing in the vicinity of the vending machines located some 50 or 60 feet from the gasoline pumps. The Cox automobile pulled over to the side of the road, and as the officers passed they observed that Cox and Webster appeared

[1]At this time their identities were unknown to the officers.

to be arguing and attempting to fight. After turning around, they arrested Webster for public drunkenness and Cox for driving without an operator's license. A search of the automobile turned up a coin box and two shaving kits containing assortments of nickels, dimes and quarters.

The officers found in Webster's front pockets a small screwdriver, a pocket knife, and an unfamiliar metal instrument with movable parts and prongs. Upon a later search of Webster in the county jail a small Allen wrench fell out of his clothing and another metal instrument like the one mentioned above was found in one of his socks. Testimony eventually introduced in the trial was ample to prove that by means of the wrench and screwdriver these peculiar instruments could be adapted for use in opening the type of locks commonly found on vending machines. Webster told one of the officers that he was a machinist by trade and had made the tools in question, though for what purpose he did not say.

During the evening of July 17 it was brought to the attention of the service station employes that coins being placed in the Coca-Cola machine were falling through to the ground, so early the next morning the owner opened it with his key and found the coin box missing. In his testimony he identified the box found in Cox's automobile as being like the one that had been removed from the machine at his station.

Neither of the defendants testified, nor did Cox, who evidently was absent and unavailable as a witness. The same counsel represented both defendants.

At the beginning of the trial counsel for the defendants invoked the rule[2] for exclusion of the witnesses, but on motion of the Commonwealth's Attorney the trial court over objection permitted the sheriff, the three deputies hereinbefore mentioned, and a state trooper who had assisted in the in-

[2]RCr 9.48

vestigation to remain in the courtroom. This, it is contended, was a prejudicial abuse of discretion.

CR 43.09, which of course applies to civil cases, provides expressly that it does not apply to "the officers of court," whereas RCr 9.48 contains no such exclusion. According to the commentary by the original drafters of the Criminal Rules, RCr 9.48 "is the same as CR 43.09 adjusted to criminal cases." The principal adjustment being the omission with reference to officers of the court, it is to be presumed that it was not unintentional. Nonetheless, it is beyond question that the whole matter of what witnesses will be excluded from hearing the others before themselves testifying lies within the sound discretion of the trial court. Cf. *Ragland* v. *Com.*, Ky., 421 SW 2d 79, 81 (1969); *Moore* v. *Com.*, Ky., 323 SW 2d 577, 578 (1959); *Ray* v. *Com.*, 241 Ky. 286, 43 SW 2d 694, 696 (1931).

A witness need not be considered an officer of the court, at least within the meaning of these procedural rules, merely because he is an officer of the law. If his presence is not required for the benefit of the court or assistance of counsel there is no reason for him to be regarded differently from any other witness. Therefore, under circumstances in which it would be held an abuse of discretion to exempt a witness from the rule, the bare fact of his being an officer of the law should not operate to make it otherwise. Hence we have reviewed the situation in this case from that standpoint.

On the facts we cannot say there was an abuse of discretion or that if so the appellant really was prejudiced. The nature of the testimony the officers were prepared to give was not such that the examination of one was apt to transmit any beneficial schooling to another, nor do we detect in their testimony any evidence that it did. There is no ground for reversal on this point.

During his opening and closing statements to the jury the Commonwealth's Attorney spoke as follows:

Opinion of the Court by Justice Palmore Affirming

"Ladies and gentlemen, this is the type of case we haven't had much experience with in this County . . . This case is not the type of case where someone goes out and breaks in a building and steals something for extra money or just because they thought they could get by with it. This is a case of professional burglary [objection overruled]. The evidence will bear out what I am saying. This is a preview of what the evidence will be. These are professional burglars and they had all the paraphernalia necessary to break into vending machines, buildings, stores or any type of place where a man could store his goods and try to protect them . . . Notice as the testimony develops that this is not the ordinary type of burglary or B and E that we have in this area. This is people coming in to our area well equipped to burglarize."

"Mr. Bach's argument centered around the Sheriff and the State Police force. They didn't do the job a highly trained police force in a larger city dealing with professionals would do. We don't have any professionals around here. We have boys going into a store and getting a few items but every once in a while a professional rogue will go throughout county and—

MR. BACH: Object. There is no evidence these people are professionals.

COURT: Overruled.

MR. BRYANT (continuing): From this evidence you are bound to conclude they are professional burglars. Mr. Bach concluded they are innocent. There is ample evidence for you to conclude they are professionals. A man making a living stealing what other people work out. He is smart too. He's smart.

MR. BACH: Object.

COURT: Overruled.

MR. BRYANT (continuing): He is real smart. He was smart enough to make these tools.

MR. BACH: Object."

Webster contends that these references to him as a "professional burglar" were improper and prejudicial and effectually deprived him of his constitutional right to confront the witness against him.

In *Lynch* v. *Commonwealth*, Ky., 472 SW 2d 263, 267 (1971), it was observed that a similar reference to the defendant as a "professional," though possibly warranted by information within the knowledge of the prosecuting authorities, "was not supported by the evidence under consideration . . . and was therefore improper," but in this case we are of the opinion that it was a fair inference for the prosecutor to argue and for the jury to draw from the evidence. It would defy credulity to suggest that one who manufactures and carries special tools for opening locks and is able to relieve a locked vending machine of its contents in broad daylight under the open view of the employes and patrons of its owner without being detected could be anything other than a professional thief.

Though Mildred Spencer did not appear as a witness, the sheriff testified that after she had been arrested and advised of her constitutional rights she confessed (orally) that Webster and Cox had opened up the vending machine "while she stood look-out for them." The point is now made that the trial court's failure to admonish the jury not to consider this evidence in determining Webster's guilt or innocence was a fatal violation of his constitutional right of confrontation under the principle of *Bruton* v. *U.S.*, 391 U.S. 123 (1968).

We are of the opinion that Webster may very well have prevented the use of Mildred's admission as against himself had he moved for a separate trial or objected to the sheriff's testimony, and that unquestionably he would have been entitled to an admonition had he asked for it. As it is, however, the subject was never brought to the attention of the trial court until mentioned among numerous other points in a motion for new trial.

RCr 9.54(2) provides that objections to instructions may be presented for the first time in a motion for new trial,[1] but it does not apply to admonitions. Though sometimes matters more appropriately the subject of admonition are included with or as a part of the instructions, that does not change their basic nature. The function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof. Directions limiting the effect of evidence are not in the category of instructions submitting the law of the case to the jury. Cf. *Bradley* v. *Commonwealth*, Ky., 439 SW 2d 61, 64 (1969), suggesting this distinction with reference to the voluntariness of a confession or consent to a search, and *Reeves* v. *Commonwealth*, Ky., 462 SW 2d 926, 930 (1971), holding that a failure to raise the question at the time the admonition is or should be given waives it.

In this instance counsel should have requested the admonition at the time the evidence was received or, if he did not decide until later not to put Mildred on the stand, at least before the jury retired for its deliberations.

The one remaining argument is that the trial court erred in permitting the witness Dalton, a designer of tools and dies, to testify as an expert, giving it as his opinion, for example, that the tools heretofore mentioned had been made for opening locks of the type he had seen on some Coca-Cola machines. From a review of the testimony we are satisfied that his qualifications were sufficient to let the jury hear and evaluate what he had to say.

The judgment is affirmed.

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[1]Effective March 1, 1974, the Rule has been amended to require presentation of such objections before the instructions are read to the jury.

Osborne, C.J., and Jones, Milliken, Palmore, Reed, and Steinfeld, JJ., sitting. Osborne, C.J., and Jones, Milliken, Palmore and Reed concur.

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MANDATE

APPELLANT'S PETITION FOR REHEARING DENIED — 5-10-74

THE COMMONWEALTH OF KENTUCKY,
COURT OF APPEALS
74 Term — Feb. 1, 1974

Carlisle Wilson Webster

vs.

Comwth. of Ky.

APPEAL FROM A JUDGMENT OF THE WOLFE CIRCUIT COURT
IND. NOS. 332 & 337, FILE # 73-266

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:
FRANCES JONES MILLS, C.C.A.

By /s/ Frances Jones Mills, D.C.

Issued May 10, 1974

TRANSCRIPT OF EVIDENCE

Campton, Kentucky
April 17 & 18, 1972

APPEARANCES

For Commonwealth: Mr. A. Dale Bryant
Commonwealth Attorney
Jackson, Kentucky

For Defendant: Carlisle Wilson Webster, present and represented by counsel:
Mr. William P. Bach
Jackson, Kentucky

April 17, 1972

PORTION OF TESTIMONY OF SHERIFF MAYNARD NICKELL

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Q 38 Sheriff, were you present when Mildred Spencer was advised of her constitutional rights?

A. I was.

Q. 39 After she was advised of her constitutional rights, did she make a statement relative

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to the breaking and entering of the vending machine?

A. Yes, she wanted to go so bad she said if we didn't use her name she would tell it like it was. She said when they pulled in to the machines up there Webster and Cox fixed the machine, she didn't know what all they did but they opened it and she stood look-out for them.

* * *

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TESTIMONY OF STATE TROOPER HOWARD

Thereupon the witness BABE HOWARD was called to the witness stand to testify on behalf of the Commonwealth and having first been duly sworn by the Court was questioned and testified as follows:

DIRECT EXAMINATION BY MR. BRYANT
COMMONWEALTH ATTORNEY

Q 1 State your name to the Court and jury.

MR. BACK: Defense stipulates that Mr. Howard, or Trooper Howard, is a member of the Kentucky State Police.

Q 1 State your name.

A Babe Howard.

Q 2 Are you a member of the Kentucky State Police?

A Yes.

Q 3 And how long have you been a member of the Kentucky State Police?

A Three years.

Q 4 Calling your attention back to July, last year, were you stationed in Wolfe County?

A Yes sir.

Q 5 And did you have occasion to assist the

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Sheriff and his force in the investigation of the breaking and entering of Parkway Standard Station?

A I did.

Q 6 Tell the jury when you got involved in this investigation?

A I came to the courthouse in the late afternoon or evening and found they had arrested some subjects and taken the instruments off of them and they showed them to me and somewhere about midnight I went to the jail and some instruments were taken off of Mr. Webster.

Testimony of State Trooper Howard

Q 7 Trooper Howard, I ask you to examine Commonwealth Exhibits 1 and 4 and see if those are the two exhibits shown to you?

A They are.

Q 8 Do you know what those instruments are, or did you know what they were the first time you viewed them?

A Not the first time.

Q 9 During the course of your investigation—first let me ask you this. During the

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course of your work as a State Patrolman had you seen instruments like that before?

A Not at that time, no sir.

Q 10 Subsequent to being shown the instruments have you made an investigation into this type of instruments?

A Yes sir, they are burglary tools. This instrument (indicating one of the exhibits) is classified as a burglary tool by the Intelligence Department of the Kentucky State Police.

Q 11 What about the other one?

A Same thing.

Q 12 What can those instruments be used for?

A Opening vending machines.

Q 13 Are you generally familiar with the locks vending machines have on them?

A Well, I am not much on locks for vending machines but they have round locks that instruments like this fit into, some of them.

Q 14 Are you acquainted with the prongs of the round lock that will cause it to open?

MR. BACK: Object to the leading.

A Yes sir. You can take those and shove

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the keys forward and open the box.

Q 15 Do you know what part of the lock these fingers come in contact with?

A It trips the tumbler in the lock.

Q 16 What is a tumbler is a round lock?

A The key that fits the lock has a thing sticking up on it and when you slide the key in it trips the tumbler and the lock will open.

Q 17 If the tumbler is properly tripped the lock will open?

A Yes.

Q 18 Do all locks have the same number of tumblers and the same spacing in the tumblers?

A No sir.

MR. BACK: Object.

COURT: Sustained. Overruled.

Q 19 They have different tumblers and different degrees of location?

A Yes sir.

Q 20 Now what did you do after you had viewed the instruments and received this information?

A I went to the jail, advised him

of his rights and told him he was under arrest for the possession of burglar tools.

Q 21 After he was advised of his rights, were more burglar tools or more instruments taken from him?

A Yes sir, I searched his billfold and took two door jammers and an allen wrench out of his billfold.

Q 22 (Exhibiting instruments to witness) Are these the two door jammers you took?

A Yes.

Q 23 What are door jams and what are they used for?

A They are used to trip locks in several different types of doors.

Q 24 Are there any other uses for a door jam that you know of?

A No sir.

Q 25 And those were in his billfold?

A They were.

Q 26 And you say you also recovered an allen wrench. Is that the allen wrench?

A Yes sir, that was also in the billfold.

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Q 27 Did you make a comparison of the various tools, that is the tools that you recovered, the screw driver and allen wrench and the lock openers to open machines with, to see if they can be used in conjunction with one another?

A Yes sir they could be. The allen wrench was used to set one and the screw driver set the screws here.

Q 28 What did you do after you left the jail?

A I ran several checks on Mr. Webster.

Q 29 Do you know what happened to Mrs. Spencer in the meantime?

A She left with Mr. Cox. It is my understanding—

MR. BACK: Object.

Q 30 What did your investigation reveal?

A She left with Mr. Cox after he was fined for having no driver's license.

Q 31 After you received these other instruments from Mr. Webster, did you and the other officers make any effort to apprehend Miss Spencer?

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A Yes sir, we stayed out all night and apprehended her early that morning.

Q 32 Where did you apprehend her?

A At the intersection over here.

Q 33 At the time you apprehended Miss Spencer, did you observe any tools or instruments in or about that car?

A Yes sir.

Q 34 I ask you to examine this instrument and ask you if you saw that anywhere.

MR. BACK: May I see that.

MR. BRYANT: (Hands instrument to Mr. Back.

A Yes sir.

Q 35 Where did you find that?

A Took it off the dash of the car.

Q 36 Did Miss Spencer have the car in her control at that time?

A She did.

Q 37 I will ask you if any other items were taken there from the Spencer girl?

A Yes sir, Sheriff took a search warrant for the car and the car was searched out at the jail.

Q 38 Did you or the sheriff recover other items from the car?

A Yes, in company with the Sheriff we found other items.

Q 39 Go through this and show the jury what you found.

A Well, this is a book showing a lot of addresses.

Q 40 What kind of book is that?

A It's an address book.

Q 41 Did you go through that address book to determine what areas of the country their phone and address listings were for?

MR. BACK: Object.

COURT: Do you want to see it?

MR. BACK: I would appreciate it. I want to object to this. This man and woman were charged with breaking and entering and possession of burglary tools and what would a book of addresses have to do with it?

COURT: Well, if it is no good the jury will decide it is no good.

MR. BRYANT: We will make it competent.

COURT: Proceed.

Q 42 What areas of the country do those addresses and phone numbers represent?

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A Indiana, Ohio, Kentucky, Alabama and several different states.

Q 43 And what type of different individuals or businesses are represented in that book?

A There is bonding companies, judges, sheriffs.

Q 44 From different sections of the country?

A Yes.

Q 45 What else did you find? Let Mr. Back see them first. (Witness hands items to Mr. Back).

All right, sir, just examine those items and tell the jury what they are.

A Well, there is an Indiana road map, some kind of race track form.

Q 46 What race track?

A River Downs.

Q 47 Look in the forms and see if there are any markings relating to the races?

A Number 4, Kentucky Auction.

MR. BACK: I still don't see how he can make that competent.

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WITNESS: There are some decals, several of them and here is a money bag.

Q 48 Let the jury see and tell where the money bags are from.

A This is from Quincy, Illinois, State Bank and this is from Texarcana State First National Bank.

Q 49 What's that?

A This is known as jumper cables.

Q 50 What are they used for?

A To cross circuit and short circuit practically anything.

Q 51 Tell the jury the purpose—or what you could short circuit with that?

A Well—

MR. BACK: Object.

COURT: Overruled.

A (continuing) It could be used to cut off alarm systems.

Q 52 Are you familiar with alarm systems?

A No sir. This is a piece of wire and there are more door jammers and this is a key similar to the instruments used to open vending machines and here is a phillip screw driver and a book of matches.

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MR. BRYANT: Now, Your Honor, I will tell you why we think all of this is competent.

MR. BACK: Mr. Bryant, I could care less why you think it is competent. It had better be competent.

COURT: Perhaps we had better hear this in chambers.

(At this point the Court, counsel for all parties and the court reporter retired to chambers where the following took place.)

MR. BRYANT: Your Honor, it is the theory of the Commonwealth and has been since the presentation of my opening statement to the jury that the defendants are professional burglars; that they have tools especially made for that purpose and the defendant, Webster, says he is a machinist and that he made those tools. According to all of the testimony before the Court those tools can only be used for opening a round tumbler lock which is used, primarily, on vending machines. We feel that any evidence placing the

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defendants in various and sunderous sections of the country are important to establish our overall theory.

Pointing to two examples, the Court is aware, I am sure, that Quency, Illinois is a border town where you can go into

Illinois, Missouri and perhaps other states; that Texarcana is a border town going into, I believe, Texas, Oklahoma and Louisiana. These factors, taken as a whole, we believe points right on our theory and establishes our theory that the defendants were traveling around the country using the burglary tools and we believe any evidence supporting that theory would be admissible.

MR. BACK: Judge, this is one of the freedoms we employ in these great United States, and that is freedom to travel from coast to coast, from border to border. This is a freedom they don't have in Russia and many other countries. The mere fact the man has a lot of road maps, or one road map from Indiana, a racing slip from River Downs shows no criminal conspiracy. This man and woman are

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charged specifically with breaking and entering a coca-cola machine at Parkway Standard Station and, in addition, the possession of burglar tools. I cannot see, for the life of me—I have a money bag or two from some banks and I am sure you have a racing form in that new Catillac of yours and it wouldn't surprise me if you don't have a phillip head screwdriver in your car. I have two or three in mine. I see no connection or competency of this evidence. It shows no intent or anything on the part of the defendants. I can't, for the life of me, see how it would be competent. I don't feel the Commonwealth has made it competent. All he had was the Trooper to bring it out of the bag and say this is this and this is this and this is this. It doesn't mean a thing, Judge.

MR. BRYANT: I have one other thing. I should have mentioned these two items to the Court initially. Two more arguments in the Commonwealth's favor is that we have

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no eye witnesses that actually saw the breaking and entering, therefore we are, by necessity, required to present our case

primarily on circumstances. I would like for the Court to consider that along with the other things I said. Also, the Trooper testified to, from this address book, names of various policemen in different sections of the country and County Judges and so forth.

COURT: Did that book contain the names of any local officials?

MR. BRYANT: No, sir. We agree with Mr. Back, each of these things taken separately would not be significant. He referred to finding a racing form in Your Honor's car, taking one factor individually might not be of any significance but because of the background of this case and taking the total of the exhibits we have offered, we feel when the Court considers it in that light it takes on a different meaning.

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COURT: Here is my ruling on this. There is no offense brought in to this trial where any of these items are connected with it. If there was an offense, say in Owensboro, Kentucky and you had a money bag in Oklahoma from that place you could admit the items. I don't believe, Mr. Bryant, that it would be admissible to prove a previous offense. They may have all committed offenses over the country but it doesn't seem to me that would be admissible evidence here and this is my ruling, that it is not admissible in this case on this charge because they are not directly connected with this case. You have the right theory and—I don't think it would be competent to put this evidence before the jury because that would reflect commission of other crimes prior to this time which are not competent in this case.

MR. BACK: I would like the Court to go a step further and state to the jury that Mr. Bryant stated he would make it competent and failed to do so.

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COURT: There is no need to ball Mr. Bryant out in the presence of the jury but what we want to do is to exclude this

from the consideration of the jury.

MR. BRYANT: On that last point, I still feel somewhat confident or convinced I might be right on it. The Court has ruled but the evidence wasn't offered with the feeling it wasn't competent just to get it before the jury.

COURT: Well, I am sure that is right. Let's get on with the trial of this case.

(Thereupon the Court, the attorneys and the court reporter returned to the courtroom and the trial of this case continued as follows.)

COURT: The items introduced here by Trooper Howard, the ones contained in this large envelope which contained a number of items beginning with an address book, I believe Mr. Bryant described all of these items, or this envelope of items, and the Court considers them not to be competent evidence. Therefore the Court admonishes

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the jury not to consider them or either of them for any purpose.

MR. BRYANT CONTINUED TO INTERROGATE THE WITNESS AS FOLLOWS:

Q 53 Trooper Howard, after the automobile being operated by Miss Spencer was stopped and searched, was she taken into custody?

A She was placed in the Wolfe County Jail.

MR. BRYANT: You may ask.

CROSS EXAMINATION BY MR. BACK
COUNSEL FOR THE DEFENDANT

Q 1 Trooper Howard, what did you refer to these as?

A Door jammers.

Q 2 I wish you would look at these in the sequence they are placed here. You have two door jammers, as you call them, and read to the jury their numbers.

A Five, six, seven and eight.

Testimony of State Trooper Howard

Q 3 And these are?

A One, two, three and four.

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Q 4 So looking at them, you start out here with 1, 2, 3 and 4 and then you go to here and it is 5, 6, 7 and eight. Is that right?

A Yes sir.

Q 5 Are those door jammers, as you call them, the same thickness?

A It is hard to say with my naked eye.

Q 6 In your best judgment?

A They look like that they are.

Q 7 All right, looking at the corners of them, Trooper, are they all the same depth or are they different?

A They are about the same depth.

Q 8 Now this and this, are they the same? Are they the same or different?

A They are different.

Q 9 Do you have information as to the occupation of Mr. Webster?

A Yes sir, I have.

Q 10 That is a machinist?

A No sir, he is a burglar.

MR. BACK: Object.

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MR. BRYANT: He can't object. He asked the question. He can't object to his own question. You asked his occupation and he told you.

Q 11 If he is a machinist, isn't it true these are some sort of feeler guages?

A I don't know.

Q 12 Could that be used for some purpose other than jamming doors?

A Well, I guess it is possible.

Testimony of State Trooper Howard

Q 13 Have you heard the term "feeler guage?"

A In relation to automobiles, not as machinery.

Q 14 What is your notion as to a feeler guage in automobiles?

A It is for thickness or depth.

Q 15 Now you testified that the first you knew of this case was when you were informed these people had been arrested and placed in the Wolfe County Jail?

A Yes sir.

Q 16 You went immediately to the jail?

A Yes sir. I ran several checks after—

Q 17 (Interrupting) Did you go immediately?

A I came down here to the Sheriff's office and we looked at the items they had and I made some checks.

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Q 18 Could you give the time this took place?

A I would say 10:00 or 11:00 O'clock.

Q 19 Now, when did you get information Parkway Standard Service Station had been broken into?

A After I had been to jail and placed Mr. Webster under arrest and after running checks we went to Parkway Standard station and we asked them to check their vending machines and they did and one boy saw some loose change in the Coca-cola machine, dropping down in the machine.

Q 20 Now, what I am trying to do is to establish the time here. At the time you saw these instruments the first time here in the courthouse, you didn't know what they were. Is that correct?

A Not the two there, the door jammers, yes.

Q 21 I am speaking of the others.

A Not at that particular time.

Q 22 And you had no evidence of Parkway Standard Station having been broken into?

A No sir.

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Q 23 How long was it from that time that you found out there had been a break-in at Parkway Standard Station?

A About three (3) hours, maybe, and we didn't know for sure until the next morning when Mr. Campbell came in with the keys.

Q 24 Actually, you tell the jury you looked at the instruments between 10:00 and 11:00 on the 17th?

A Yes.

Q 25 And you didn't know that the coca-cola vending machine had been broken into until the following day, the 18th at what time?

A Between 1:00 and 2:00.

Q 26 In the morning or afternoon?

A Morning.

Q 27 And that was some three or four or five hours after you saw the instruments?

A No it was some two or three hours.

Q 28 Well, I am saying before you actually knew they had been broken into?

A Yes.

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Q 29 Did you take the instruments here and attempt to open the coca-cola machine, the vending machine at Parkway Standard Station?

A I was present. The Coca-cola machine they couldn't open but it did open the candy machine.

Q 30 Was the candy machine broken into?

A Not to my knowledge.

Q 31 What machine was broken into?

A The Coke machine.

Q 32 The Coca-cola machine only?

A Yes.

Q 33 And the instruments introduced into evidence

were attempted to be used on that machine and it wouldn't open.

A Yes but it had been—the keys—I know the keys will manipulate to fit different locks.

Q 34 Do you know the keys will manipulate to fit the lock on that coca-cola vending machine?

A Well, I don't know.

Q 35 Do you know how to work it?

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A No sir I don't know how. I don't know much about locks.

Q 36 You don't know much about locks.

A I know when a key will fit one.

Q 37 You were present when an attempt was made to open the Coca-cola vending machine at Parkway Standard and they could not unlock the machine?

MR. BRYANT: Object.

Q 38 Did they, in fact, unlock the machine?

A They did not.

Q 39 They did not unlock the machine?

A No.

MR. BACK: That's all.

* * *

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CLOSING ARGUMENT BY MR. BRYANT, COMMONWEALTH ATTORNEY

THEREUPON MR. BRYANT ARGUED THE CASE BEFORE THE JURY AS FOLLOWS:

MAY IT PLEASE THE COURT:

Ladies and gentlemen of the jury, I don't think I will use my eleven (11) minutes talking about guilt. I think it would

be wasting my time and yours. All twelve of you have concluded they are guilty.

I have had respect for Bill Back's judgment, in the past, concerning law and evidence but how in the world he could reach a conclusion from this testimony that these people are not guilty is beyond me. He says he don't think they are guilty. Maybe he doesn't but we might wonder how they could come to that conclusion in light of the fact they were caught red-handed and she confessed. She said, "yes, we were at the Parkway Station and I was the lookout. I was to signal them if anybody came." That's the reason the boys didn't catch them. They had a lookout. When somebody comes to steal from you, of course they don't steal while you are looking at them. If they had seen them Miss Spencer would have said, wait boys here comes a worker. Why talk about guilt when you have a confession of a defendant that said "We did it." "I was the lookout." Is what she said.

Now let's go a little further. Mr. Back talked about the sophisticated tools, the screwdriver and the pocket knife and the other tools and he has suggested they are not burglar tools. It would be a common thing for a carpenter or mechanic to have a pocket knife or screwdriver

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in his tools. The housewife may have a screwdriver of this type or a similar type pocket knife around the house to do various of chores with. Mr. Back never once suggested to you these were household items. These aren't household items and if you know anybody that has any in their house you had better tell them to get rid of them, they are burglar tools and if they are caught with them they might get from 2 to 10 years in the penitentiary.

Mr. Back's argument centered around the Sheriff and the State Police force. They didn't do the job a highly trained police force in a larger city dealing with professionals would

do. We don't have any professionals around here. We have boys going out and breaking store windows and going into a store and getting a few items but every once in a while a professional rogue will go through out county and—

MR. BACK: Object. There is no evidence these people are professionals.

COURT: OVERRULED.

MR. BRYANT (continuing) From this evidence you are bound to conclude they are professional burglars. Mr. Back concluded they are innocent. There is ample evidence for you to conclude they are professionals. A man making a living stealing what other people work out. He is smart too. He's smart.

MR. BACK: Object.

COURT: Overruled.

MR. BRYANT (Continuing) He is real smart. He was smart enough to make these tools.

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MR. BACK: Object.

COURT: He told the officers he made the tools. Overruled.

MR. BRYANT: (Continuing) If he had channeled that intelligence toward something worthwhile he could have made a good living and been a credit to his community. Mr. Back wanted to criticise Mr. Dalton for being out making a living with maybe not the ability this man has. This man could have done well in life if he had chosen but he chose to design a precision tool to steal what other people have worked out. It is not a trivial matter about the vending machines. Some of them you can get a complete dinner out of by putting three or four dollars in it. You take one of these things (indicating to exhibits) and go from Winchester to Hazard and no telling how much money you could get. He is smart but he made one mistake. He got drunk. If he hadn't gotten drunk they

wouldn't have caught him. He got drunk and when him and Mr. Cox got to fighting over that woman, he got caught. If he had stayed sober we wouldn't be trying them.

Mr. Back made much of the Sheriff not knowing what this was. Not many people in this county would know. One of the deputy sheriffs thought it was something to fight with.

Why was Mr. Cox wanting to get away? He knew it was burlar tools and he knew the money he had on him would be evidence against him so he ran up here and took all the change out of his pocket and put it in the jar and from the witnesses he was in such a hurry to get out of this courthouse he wouldn't have taken time to sort the

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pennies from the nickels. Sheriff Nickell isn't equipped to deal with professional rogues and they made some blunders but they did an excellent job. When they found this was burglar tools they had Mildred Spencer and Carslile Wilson Webster arrested and put them in jail and they would have gotten Cox too but he flew the coop and they never have gotten him.

What explanation did Mr. Back make for the tools? He said it was the type tool you work on some kind of lathe with. Be reasonable. If this is the type of tool you work on a lathe with or that you would have around the home, why in the world would a man be out drunk having it in his sock and an allen wrench stuck in his sweater. The evidence is conclusive they are guilty. There is no question about it. If they couldn't get in with one tool they had this key. They had an allen wrench to make all necessary adjustments in the tools.

Relative to guilt, this appears to be the greatest case of guilt I have ever seen, excluding the confession. If she hadn't admitted she was the lookout, this would be good evidence here. Look at these (referring to exhibits) slip them in a door and you can't get back in. The people in this county are no match for a professional thief.

Closing Argument by Commonwealth Attorney

I can't send this man to the penitentiary and the Congress of the United States can't. You are the only ones who can do that. You are the only means between an organized society and anarchy. If you don't do your duty we are lost. I have presented the case to you the best I can. When you go in the jury room, there are twelve (12 of you and if I went in or if His Honor went it would be

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a mis-trial. You are not sitting on this jury as individuals but as members of organized society. The people are entitled to protection. If you or anyone works half of their life and accumulates merchandise they are entitled to keep that and a professional rogue isn't entitled to slip through the county while you are sleeping and steal it.

Now the only question is what are you going to do? Ordinarily I don't make suggestions as to penalties, that's your provance, but I would, as your Commonwealth Attorney and a representative of the people, like to ask you, at least so far as Carslile Wilson Webster is concerned, to give him the maximum penalty. That's what it's going to take. You have to do it. You are bound to do something. I asked you when you were qualifying on the jury if you thought if a man was found guilty he ought to be given the lowest penalty and you said you did not. You said you would use your discretion. Is there a difference in a 16 year old boy breaking a window out of a store and stealing a pack of cigarettes and a bottle of pop and this? Yes, there is a difference. I ask you to give that man fifteen years, ten on one charge and five on the other. Take these tools to the jury room with you.

MR. BACK: What about the time.

COURT: Your time has expired, Mr. Bryant.

MR. BRYANT: Thank you.

COURT OF APPEALS OF KENTUCKY
FILE NO. 73-266

CARLISLE WILSON WEBSTER APPELLANT

versus

COMMONWEALTH OF KENTUCKY APPELLEE

* * * *

**MOTION TO SET ASIDE
ISSUANCE OF MANDATE
AND TO REISSUE SAME ANEW**

* * * *

Comes the Appellant, by counsel, and respectfully moves the Court to set aside the mandate issued herein on May 10, 1974 and to reissue said mandate anew for the following reasons:

1. The Appellant filed a timely Petition for Rehearing herein. The Commonwealth responded and Appellant moved the Court for permission to file a reply which was sustained on April 22, 1974.

2. This Court over-ruled the Petition for Rehearing and issued a mandate on May 10, 1974. However, neither of the Appellant's counsel received any notice or copy of the mandate from the Clerk of this Court. The affidavits of William P. Bach and Frank E. Haddad, Jr. in support hereof are attached hereto and made a part of this motion as if fully copied herein.

3. It was not until August 19, 1974 that Frank E. Haddad, Jr. discovered, when he called the Clerk's office to inquire of the status of the case, that the Petition for Rehearing had been over-ruled and the mandate had issued on May 10,

1974. At this time, more than ninety (90) days had expired within which the Appellant had to file a Petition for Certiorari in the United States Supreme Court as provided for in Rule 1.345(b) of this Court.

4. RCA 1.340(a) grants this Court inherent discretion to recall the issuance of its mandate. RCA 1.340(c) provides that a copy of the mandate shall be sent to the trial Court from which the appeal was taken and a copy thereof to each attorney of record. As stated in the affidavits of counsel filed herewith, neither have received a copy of the mandate.

For the reasons stated herein and in the interest of fairness and justice, the Appellant respectfully moves this Court to recall or set aside the issuance of the mandate and to thereafter issue said mandate anew and to further stay the execution and enforcement of the mandate for a period of at least 30 days to permit the Appellant to petition for a Writ of Certiorari in the Supreme Court of the United States.

RESPECTFULLY SUBMITTED,

/s/ William P. Bach
WILLIAM P. BACH
First National Bank Bldg.
Jackson, Kentucky 41339

/s/ Frank E. Haddad, Jr.
FRANK E. HADDAD, JR.
529 Kentucky Home Life Bldg.
Louisville, Kentucky 40202
Counsel for Appellant

I certify that a copy hereof has been served on Hon. Ed. Hancock, Attorney General of Kentucky, this 9th day of September, 1974.

/s/ Frank E. Haddad, Jr.
COUNSEL FOR APPELLANT

AFFIDAVIT
OF
WILLIAM P. BACH

Comes the Affiant, William P. Bach, and states that he is the Chief Counsel for the Appellant herein, having represented the Appellant at the trial herein and having represented him in conjunction with Frank E. Haddad, Jr. on the appeal herein.

Affiant further states that the last correspondence he received from the Clerk of this Court was a letter dated April 22, 1974 advising that this Court had sustained the Appellant's motion to file a reply to the response to the Petition for Rehearing.

Affiant further states that he was under the distinct impression that the Petition for Rehearing was still pending until August 19, 1974, when he received a call from Mr. Haddad advising that he had just that day learned that the Petition for Rehearing had been denied and the mandate had issued on May 10, 1974.

Affiant further states that he has never received any notice from the Office of the Clerk of this Court advising that the mandate had issued. Affiant further states that on August 26, 1974, he was able to check with the Circuit Court Clerk in Wolfe County and was advised by the Clerk that she had received and filed the mandate on May 13, 1974.

Affiant further states that it was the clear intention of the Appellant in the event his Petition for Rehearing was overruled, to file a Petition for Certiorari in the Supreme Court of the United States.

/s/ William P. Bach
WILLIAM P. BACH, AFFIANT
First National Bank Bldg.
Jackson, Kentucky 41339

SUBSCRIBED AND SWORN to before me by William P. Bach, this the 5th day of September, 1974.

My Commission Expires: April 8, 1978.

/s/ Jody Carol Barnett
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

AFFIDAVIT
OF
FRANK E. HADDAD, JR.

Comes the Affiant, Frank E. Haddad, Jr. and states that he is one of the attorneys of record herein and that subsequent to the filing of the Petition for Rehearing herein he did not receive any notice from the Office of the Clerk of the Court of Appeals that the Petition for Rehearing had been over-ruled and the mandate had issued.

That on August 19, 1974, he telephoned the Clerk's office and spoke to Mr. John Scott and was for the first time advised that the Petition for Rehearing was over-ruled and the mandate had issued on May 10, 1974. He then advised Mr. Scott that he had not received a copy of the mandate or any notice that the Petition for Rehearing had been over-ruled.

Thereafter, on the same day, Affiant telephoned Chief Counsel, Attorney William Bach to inquire if he had received any notice that the Petition for Rehearing had been over-ruled and that the mandate had issued. Mr. Bach informed Affiant that he had not received any such notice and that he too thought that the that the [sic] Petition for Rehearing was still pending.

Affiant further states that it was the express intention of the Appellant to file a Petition for Certiorari in the Supreme Court of the United States in the event that his petition herein for rehearing had been over-ruled and had Affiant received notice that the petition had been over-ruled and the

mandate had issued on May 10, 1974, he would have, in conjunction with Mr. Bach, prepared and filed said petition within the 90 days provided by the rules of this Court.

/s/ Frank E. Haddad, Jr.
FRANK E. HADDAD, JR. AFFIANT
529 Kentucky Home Life Bldg.
Louisville, Kentucky 40202
583-4881

SUBSCRIBED AND SWORN to before me by Frank E. Haddad, Jr., this the 28 day of August, 1974.

My Commission Expires: Jan. 11, 1978.

/s/ Miss Mariellen Gourley
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

COURT OF APPEALS OF KENTUCKY
73-266

CARLISLE WILSON WEBSTER APPELLANT

vs.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE S. H. RICE, SPECIAL JUDGE
INDICTMENT NOS. 332 & 337

ORDER DENYING MOTION TO RECALL MANDATE

* * * *

Appellant's motion to recall or set aside the issuance of the mandate, to issue the mandate anew and to further stay the execution and enforcement of the mandate for 30 days is denied without prejudice to the appellant to petition the Supreme Court of the United States for a belated application for a writ of certiorari.

Steinfeld, Stephenson, Jones and Milliken, JJ., sitting. All concur.

ENTERED September 19, 1974.

/s/ Scott Reed
Acting Chief Justice

SUPREME COURT, U. S.

No. 74-468

FILED

NOV 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

CARLISLE WILSON WEBSTER .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ED W. HANCOCK
ATTORNEY GENERAL

KENNETH A. HOWE, JR.
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-468

CARLISLE WILSON WEBSTER .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is styled *Webster* v. *Commonwealth*, Ky. 508 S. W. 2d 33 (1974). It is also printed in Petitioner's Appendix at pages 1a-7a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

I. WHETHER THE ADMISSION, WITHOUT OBJECTION, OF A CO-DEFENDANT'S ORAL CONFESSION WAS A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

Petitioner urges that his constitutional right of confrontation was violated when the Commonwealth introduced the testimony of Sheriff Maynard Nickell. Sheriff Nickell testified that the co-defendant, Mildred Spencer, made an oral confession implicating the petitioner. Spencer and the petitioner did not testify.

The Sheriff's testimony was not challenged or objected to until a motion for new trial was filed. In his motion for new trial the petitioner sought an admonition to the jury not to consider this evidence. The ground for new trial was as follows:

> "The Defendants' objection to the failure of the Court to properly instruct the jury on the weight of evidence to be considered against the Defendant Webster as regards the said confession and admission of the Defendant Spencer should have been sustained and remedied."

The Court of Appeals of Kentucky in its opinion agreed that petitioner could have prevented the use of the co-defendant's confession had he objected or requested a severance. The Court of Appeals, also, observed that the requested for relief was not made timely when the issue was raised for the first time in a motion for new trial.

The Court of Appeals of Kentucky is deciding this case made a decision on state criminal procedure and did not decide this issue on constitutional grounds. The Court of Appeals held under the Kentucky Rules of Criminal Procedure that instructions to the jury must state what the jury must believe from the evidence. Directions limiting the effect of evidence are not in the category of instructions submitting the law of the case to the jury. (Petitioner's Appendix, page 6a)

The only argument presented below in the trial court and on appeal to the Court of Appeals was whether the trial court should have admonished the jury as to the weight of evidence of the co-defendant's confession. The issue presented for review is not whether petitioner's

right of confrontation was violated but rather when was the trial court obligated to give the admonition.

The Court of Appeals held that the admonition should have been given at the time the evidence was received or least before the jury retired for its deliberations. (Petitioner's Appendix, p. 6a).

It is our contention that petitioner's argument must fail for the reason that petitioner's argument was not decided on constitutional grounds but rather on the Court of Appeals' interpretation of its Rules of Criminal Procedure. See *California* v. *Krivda*, 409 U. S. 33, 93 S. Ct. 32, 34 L.Ed. 2d 245 (1972).

Also, petitioner argues that the right of confrontation is such a substantial right that the Court of Appeals should have reached the substance of the issue even without an objection being made.

In response to this, we wish to point out to this Court that this argument was not advanced until after the Court of Appeals' opinion was delivered. Petitioner raised this argument for the first time in his petition for rehearing before the Court of Appeals of Kentucky. This Court is not obligated to reveiew an issue not argued in state court. *Moore* v. *Illinois*, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed 2d 706 (1972) and *Hill* v. *California*, 401 U. S. 797, 91 S. Ct. 1106, 28 L. Ed 2d 484 (1971).

II. WHETHER THE COMMONWEALTH ATTORNEY'S CLOSING ARGUMENT WAS PREJUDICIAL TO PETITIONER'S RIGHT OF A FAIR TRIAL.

Petitioner urges that his Sixth Amendment right was violated when the Commonwealth Attorney referred to him as a "professional".

As petitioner stated in his brief, the Court of Appeals of Kentucky has long recognized the rule that attorneys must confine themselves to the facts in the record. (see cases cited in Petitioner's Brief, p. 22-23). The Court of Appeals has had no hesitancy in condemning overzealous prosecutors. The Court of Apepals held that a prosecutor's repeated references to the defendant's "track record" was prejudicial. *Messmear* v. *Commonwealth*, Ky. 472 S. W. 2d 682 (1971). In *Lynch* v. *Commonwealth*, Ky. 472 S. W. 2d 263 (1971) a reference to the defendant as a "professional" was held to be prejudicial.

Petitioner in his argument passes lightly over the Court of Appeals specific finding that it was a fair inference on the facts for the prosecutor to argue to the jury that petitioner was a professional thief. As the Court of Appeals stated in its opinion:

> "It would defy credulity to suggest that one who manufactures and carries special tools for opening locks and is able to relieve a locked vending machine of its contents in broad daylight under the open view of the employes and patrons of its owner without being detected could be anything other than a professional thief." (Petitioner's Appendix, p. 5a)

CONCLUSION

The trial court and the Court of Appeals of Kentucky decisions are clearly supported by the evidence and we urge that there is not presented here any constitutional issue of sufficient magnitude to warrent this Court's consideration. There is no showing that the Court of Appeals of Kentucky has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Respectfully submitted,

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ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that Kenneth A. Howe, Jr. being a member of the Bar of this Court, have sent three copies of the foregoing to the Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202 and the Hon. William P. Bach, First National Bank Building, Jackson, Kentucky 41339, by first class mail, postage prepaid, this 19th day of November, 1974.

/s/ Kenneth A. Howe, Jr.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

SUPREME COURT, U. S.

JAN 8 19

MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM, 1974
No. 74-468

CARLISLE WILSON WEBSTER - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY **Respondent**

PETITION FOR REHEARING

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Supreme Court Of The United States

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CARLISLE WILSON WEBSTER *Petitioner*

versus

COMMONWEALTH OF KENTUCKY *Respondent*

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of CERTIORARI entered on December 16, 1974 and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

Petitioner was Deprived of the Effective Assistance of Counsel as a Result of the Representation of Co-defendants Having a Conflict of Interests.

The Petitioner is guaranteed the right to effective assistance of counsel by the Sixth and Fourteenth Amendments and as such to a fair and impartial trial. However, he was denied a fair trial in this instance due to the development of a situation wherein testimony as to a co-defendant's extra-judicial admission incriminating Petitioner was admitted into evidence without even an admonition or instruction to the jury

that the admission should not be considered against him.

At the trial of the case, Sheriff Maynard Nickell testified that co-defendant, Mildred Spencer, made an oral confession to him, *out of the presence of Petitioner,* that "when they pulled into the machine up there Webster and Cox fixed the machine, she didn't know what all they did, but they opened it and she stood lookout for them." (Appendix to original Petition, 9a). Certainly, if defense counsel William Bach had known of this admission prior to trial he would not have represented both Spencer and Webster because of the conflict of interests and the apparent requirement of different defenses. Further, counsel would have obviously objected to the prosecutor's motion that all of the charges be consolidated for trial (T.R. 3-4).

It must then be assumed that Mr. Bach did not learn of the extra-judicial admission until Sheriff Nickell testified from the stand, and that not until that point in time did he realize that he was representing two defendants with a conflict of interests. If counsel had been representing only Webster, his action could have been to object to the introduction of Sheriff's testimony as to the admission and move for a severance or request that an admonition be given to the jury limiting the use of the testimony. However, because of the baffling problem suddenly confronting him, Mr. Bach chose to do nothing until the time came for filing a motion for new trial, when he listed the absence of an instruction limiting Sheriff Nickell's testimony concerning the admission as error.

Defense counsel was presented with a situation wherein he must have felt that whatever action taken at

the time of the introduction of the Sheriff's testimony would have resulted in favoring the defense of one co-defendant while neglecting the defense of the other. An objection to the introduction of Mrs. Spencer's admission would have been an action towards discrediting her. And indeed, Mr. Bach would also have found it difficult to request to cross-examine his own client, Spencer, in an attempt to discredit her in favor of his other client, Webster. As a result, Webster's defense was neglected and he was denied his guaranteed Sixth Amendment right of confrontation. In direct conflict with the holding of this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968), the jury was allowed to consider the admission of co-defendant Spencer as evidence against the Petitioner due to a resulting conflict of interests between Spencer and Webster.

A number of cases have held that the right to have the effective assistance of counsel is guaranteed by the Sixth Amendment and that a conflict of interests in the representation of two different defendants is a deprivation of this right. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963); *United States* v. *Harris*, 261 F.2d 792 (9th Cir. 1958).

However, it is difficult to determine the precise test for ineffective assistance of counsel. In *Glasser*, a factual situation involving a court appointment of an attorney to represent two defendants, the language of this Court reads that a showing of specific prejudice need not be made; the only requirement is that a conflict of interests exists. But, in numerous other cases, such as *United States* v. *Marshall*, 488 F.2d 1169 (9th Cir. 1973) and

Sanchez v. *Nelson*, 446 F.2d 849 (9th Cir. 1971), it has been held that prejudice must be made a part of the test for determining ineffective assistance of counsel where the defendant retains counsel himself. If the test be only that the two defendants have a conflict of interests, then Petitioner can certainly be considered to have been deprived of his Sixth Amendment right, and, if this Court should decide that specific prejudice must be shown, then the claim in the instant case that Webster was deprived of effective counsel is even stronger. As mentioned previously, Petitioner's defense was neglected as the co-defendant's admission was considered against him by the jury without even an admonition limiting its effect. Further, the admission by Mrs. Spencer added substantially to the weight of the Commonwealth's case against Webster. The other evidence against him was entirely circumstantial. No witness saw Petitioner break into the Coca-Cola machine. Thus, with only circumstantial evidence from which to determine his guilt beyond a reasonable doubt, the jurors may have very well weighed Spencer's admission heavily as against Webster.

Finally, we believe that the Petition for Rehearing should be granted because in being denied the right of confrontation as a result of the ineffective assistance of counsel, Petitioner was denied a substantial constitutional right. Speaking of the right of confrontation as related to the problem to the introduction into evidence of a co-defendant's extra-judicial admission, this Court in *Russell* v. *Roberts*, 392 U.S. 293 (1968), spoke of the inherent danger to a defendant:

" . . . the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined."

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the Petition and review the judgment and opinion below.

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Counsel for Petitioner

Of Counsel:

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Jackson, Kentucky 41339

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.